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No. **147**
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In the Supreme Court of the United States

October Term, 1942.

HERBERT FREDERIC MILLER, *Petitioner,*

vs.

ELSIE A. MILLER, *Respondent.*

**Petition for Writ of Certiorari, and Brief in
Support Thereof.**

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1942.

No. _____

HERBERT FREDERIC MILLER, *Petitioner,*

vs.

ELSIE A. MILLER, *Respondent.*

PETITION FOR WRIT OF *CERTIORARI* TO THE CIR-
CUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

I.

Summary and Short Statement of Matter Involved.

Respondent filed this suit in the United States District Court for the Northern District of Oklahoma against petitioner, her former husband, to recover upon an alleged separate maintenance agreement. Petitioner's motion to dismiss was sustained by the trial court, Judge SAVAGE presiding, upon the ground, among others, that the asserted right or claim had been previously adjudicated upon the merits in a prior suit between the same parties in the District Court of Tulsa County, Oklahoma, affirmed by the Supreme Court of Oklahoma (*Miller v. Miller*, 186 Okl. 566, 99 P. (2d) 515, *certiorari* denied 311 U. S. 645). On appeal

by respondent to the Tenth Circuit Court of Appeals, the judgment of the District Court was reversed. By stipulation of the parties both the trial and appellate courts took judicial notice of the proceedings in the state court case which were incorporated into the record. (R. 13)

The Circuit Court of Appeals decided (R. 97) that

- (1) "the alleged separation agreement between the parties was pleaded in the Oklahoma court as a valid agreement, subject to the approval of a court of competent jurisdiction."
- (2) Respondent did not seek to recover on the contract "except in so far as it constituted a 'guide' and for the persuasive effect to which it was legally entitled in the determination of the equitable issue of alimony incidental to the divorce, which the Oklahoma court undoubtedly has the equitable power and the duty to adjudge." (R. 97)
- (3) Such preexisting contract was not extinguished by the state court decree.

Respondent and petitioner were married in 1911 and lived together as husband and wife until their separation June 1, 1920, at which time they were living in New Jersey. June 30, 1920, they entered into a written separation agreement (R. 5) which provided for support and maintenance of respondent and their daughter, born May 21, 1916. By the terms of said agreement, petitioner agreed:

- (1) To convey the home in New Jersey, free of encumbrance, to respondent.
- (2) To execute a bill of sale to respondent covering all household furniture, furnishings, all other personal property then upon said real estate and premises.
- (3) To pay respondent \$50.00 per week from July 1, 1920, to July 1, 1923.

Respondent agreed to accept the foregoing provisions in full of alimony and for support and maintenance of herself and daughter until July 1, 1923.

It was further agreed that on or before June 1, 1923, the parties would agree, if possible, as to provision to be made by petitioner for support and maintenance of respondent and daughter after July 1, 1923.

By letter of petitioner to respondent of May 24, 1923, after respondent had obtained a divorce decree *nisi* in New Jersey, petitioner stated:

- (1) That he might possibly wish to remarry during the summer, that this was permissible under the laws of a number of states in spite of fact that the six months' period in New Jersey would not elapse until November 2nd, and asked respondent to advise him that he need expect no detrimental action on her part should he remarry before expiration of six months required by New Jersey law.
- (2) "Commencing with July, I expect to increase my allowance to you and Elsie Julia from \$216.66 a month, the present rate, to \$250.00 a month, and I hope that no further legal matters will be raised which might prevent my being able to continue to send you this amount. This, of course, rests in your hands."

Counsel for respondent in letter of May 29, 1923 (R. 8), replying to petitioner's letter advised that his client had no intention of doing anything whereby the final decree of divorce would be interfered with and stated:

"We might add in regard to the monthly payments, that while we had no definite arrangement when these payments were to begin, we thought they would start when the understanding was reached with your solicitor."

The divorce, which was obtained by publication service on petitioner who then resided in Oklahoma, made no reference to alimony or property settlement.

Petitioner paid to respondent \$250.00 per month to June, 1932, and paid lesser sums per month until May, 1937, when the child became 21 years of age, and thereafter made no further payments. The total amount paid, together with the value of the real estate and personal property which petitioner conveyed to respondent, aggregated the sum of \$58,867.74. (*Miller v. Miller*, 186 Okl. 566, 567, 99 P. (2d) 515, 517.)

State Court Case of Miller v. Miller:

On May 29, 1937, respondent as plaintiff sued petitioner as defendant in the District Court of Tulsa County, Oklahoma, alleging the marriage, the birth of the daughter, the separation agreement, the subsequent divorce, the circumstances of the parties on the issue of alimony and also pleaded the alleged contract of June 30, 1920, and letters of May 24 and 29, 1923, the same alleged contract sued on in the instant case, and alleged that the original contract, supplemented by the aforesaid letters, "do not become and are not binding agreements as contracts unless and until approved by a court of competent jurisdiction * * *" and that "the plaintiff is entitled to have said alimony contracts approved and to have alimony awarded to her in accordance therewith or equivalent thereto, and such additional alimony and division of property as is reasonable and just," and prayed "that said alimony agreements above referred to be approved by the court and that she be awarded alimony in the amount therein agreed upon by and between the plaintiff and the defendant and for such additional ali-

mony and a division of property as may be just," and her attorney fees, costs, and general relief. (R. 35)

The trial court found that by reason of the total sum theretofore paid to plaintiff, defendant had fully performed his duty and obligation with respect to alimony and property rights and for support and maintenance of their minor child, and entered judgment for the defendant.

On appeal to the Supreme Court of Oklahoma plaintiff unsuccessfully contended that she was entitled "to recover judgment on the written maintenance, alimony agreement and property settlement contract." (*Miller v. Miller*, 186 Okl. 566, 99 P. (2d) 515-518.)

The Supreme Court found that defendant had paid plaintiff in property and money an amount approximately equivalent to the total financial worth of both the parties at the time of the divorce and affirmed the judgment of the trial court except with respect to allowance of costs and attorney's fees. In remanding the case to the trial court, the Supreme Court said:

"The trial court is therefore directed, upon a hearing *for that purpose only*, to ascertain the reasonable and necessary expenses incurred by the plaintiff in this litigation including a reasonable attorney's fee and enter judgment for the payment thereof.

"Subject to the foregoing modification the decision of the trial court is affirmed." (Italics ours.) (186 Okl. 566, 571, 99 P. (2d) 515, 520.)

Plaintiff applied to the Supreme Court of the United States for *certiorari* to the Supreme Court of Oklahoma and as one of the reasons for granting the writ relied upon the denial by the Supreme Court of Oklahoma of plaintiff's rights of recovery on the alleged postnuptial contracts.

(Pages 14, 15, 19, petition for *certiorari*, *Miller v. Miller*, October Term 1940, No. 83, of which this Court will take judicial notice.) *Certiorari* was denied, 311 U. S. 645.

II.

Basis Upon Which It Is Contended That This Court Has Jurisdiction.

(1) This petition for *certiorari* is prosecuted pursuant to the provisions of Section 24⁹ of the Judicial Code as amended. (Title 28, Sec. 347, U. S. C. A.)

(2) The opinion (R. 93) and decree (R. 104) of the Circuit Court of Appeals sought to be reviewed were filed on March 5, 1943. Petition for rehearing was filed April 2, 1943 (R. 105), and the court entered an order denying such petition on the 19th day of April, 1943 (R. 107), PHILLIPS, J., dissenting.

III.

Questions Presented.

The questions presented by this petition are,

(1) whether the court below was required to follow decisive and controlling decisions of the Supreme Court of Oklahoma;

(2) whether there are controlling and decisive cases by the Supreme Court of Oklahoma which the court below failed to follow, and

(3) if so, is the matter of such importance as to warrant this Court in granting *certiorari*.

IV.

Reasons Relied Upon for Allowance of the Writ.

There are special and important reasons for the allowance of the writ which will appeal to the sound judicial discretion of this court. These are:

(1) The court below overlooked the doctrine and policy laid down in *Erie R. Co. v. Tompkins*, (304 U. S. 64, 82 L. ed. 1188) and the subsequent cases uniformly in accord with that doctrine and policy, construing Section 34 of the Judiciary Act of 1789, as amended. (28 U. S. C. A. 725)

(2) The court below decided important questions of local and general law in conflict with controlling decisions of the highest court of Oklahoma.

The court's opinion that the determination of the issue of alimony by the Oklahoma Court, with the alleged contract pleaded and offered in evidence on that issue, did not extinguish the contract is based upon general text books and conflicting decisions from other states and is in conflict with the decision of *Miller v. Miller* by the Supreme Court of Oklahoma and with uniform decisions of that court both before and after *Miller v. Miller*.

The effect of this decision is to set up within the state two divergent and conflicting systems of law, one to be applied in the state courts, the other to be availed of in the United States Courts in diversity of citizenship cases. This decision disrupts uniformity in the administration of the law within the state, which uniformity, by the doctrine and policy announced in the *Erie R. Co.* case, this court has consistently sought to achieve.

Wherefore, your petitioner prays that this court issue a writ of *certiorari* to the United States Circuit Court of

Appeals for the Tenth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Tenth Circuit had in case numbered and entitled on its docket No. 2568, *Elsie A. Miller, Appellant, v. Herbert Frederic Miller, Appellee*, to the end that this cause may be reviewed and determined by this court as provided by the Statutes of the United States, and that the judgment and decree herein of the said United States Circuit Court of Appeals for the Tenth Circuit may be reversed by this court and for such further or other relief as to this court may seem proper.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

I.

Opinions of the Courts Below.

No written opinion was rendered by the trial court. The journal entry of the order of the trial court sustaining petitioner's motion to dismiss appears at page 14 of the record. The opinion of the Circuit Court of Appeals appears in the record beginning at page 93. It is not officially reported.

II.

Jurisdiction of This Court.

The grounds of jurisdiction of this court were stated under II of the petition for writ of *certiorari*.

III.

Statement of the Case.

This has been sufficiently covered under I in the petition for writ of *certiorari* and in the interest of brevity is not repeated here.

IV.

Specifications of Errors.

The Circuit Court of Appeals erred as follows:

(1) In failing to give effect to the rule that it was bound to follow controlling decisions by the Supreme Court of Oklahoma.

(2) In failing to abide by controlling decisions of the

Supreme Court of Oklahoma which required it to affirm the judgment of the trial court.

V.

Argument.

Following is a summary of the points which will be argued:

(1) This cause is governed by controlling decisions of the Supreme Court of Oklahoma.

(2) By reason of the decision in *Miller v. Miller* the instant action cannot be maintained.

(3) The Circuit Court of Appeals was bound by controlling decisions of the Supreme Court of Oklahoma under which the contract sued on was extinguished by the state court judgment in *Miller v. Miller*.

(4) Under controlling decisions of the Supreme Court of Oklahoma the present action is estopped or barred by the state court judgment in *Miller v. Miller*.

(5) No Oklahoma Supreme Court decisions cited in the opinion of the Circuit Court of Appeals supports its decision, but so far as pertinent support our contentions.

POINT ONE.

This cause is governed by controlling decisions of the Supreme Court of Oklahoma.

—*Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188.

West v. American Telephone & Telegraph Co., 311 U. S. 223, 85 L. ed. 139, 144:

“Rules of decisions established by judicial decisions of State Courts, as well as those prescribed by

Statute are 'laws' within the requirement of the judiciary act (28 U. S. C. A., Sec. 725) that state laws shall be the rules of decision in trials at common law in the Federal Court. (p. 139)

"* * * the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by the Federal Courts as defining state law, * * *. But the obvious purpose of Section 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the Federal Courts only in case of diversity of citizenship. That object would be thwarted if the Federal Courts were free to choose their own rules of decision whenever the highest court of the state has not spoken." (p. 144)

Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 85 L. ed. 1477:

"The proper function of a Federal Court in a case governed by state law, is to ascertain what the state law is, not what it ought to be."

—*Griffin v. McCoach*, 313 U. S. 498, 85, L. ed. 1481.

The Circuit Court of Appeals obviously overlooked the doctrine of the above cases because it cites cases from New York, New Jersey, California, Utah, Ohio, Michigan, Kentucky and Missouri, and also general text books on the subject and applies the general rule of law so formulated from these conflicting decisions to the case at bar.

POINT TWO.

By reason of the decision in *Miller v. Miller* the instant action cannot be maintained.

Miller v. Miller was brought in the state court to determine the extent of defendant's obligation to pay alimony

and for a decree in accordance with such determination. The issue in the case was the amount of alimony, if any, which plaintiff was entitled to recover from defendant. The separate maintenance contract was pleaded and offered in evidence in support of plaintiff's case. Defendant pleaded that he had fully discharged his obligation to pay alimony and denied liability.

Upon the issues so presented the state trial court found "that the amount paid by said Herbert Frederic Miller to Elsie A. Miller was a fair and reasonable amount to be paid by him to said Elsie A. Miller as alimony for herself and as support and maintenance of said child of said parties, and is all the money that should be paid by said Herbert Frederic Miller to said Elsie A. Miller as alimony for herself and as support and maintenance money for said child," (R. 82)

and concluded as a matter of law

"that the amount which has been paid by the defendant to the plaintiff between November 3, 1923, and the date of the filing of the petition in this cause, was paid by the defendant to the plaintiff both as alimony for plaintiff, and for support and maintenance of the minor child of plaintiff and defendant, and in lieu of a property division between plaintiff and defendant, and the court concludes as a matter of law that the total sum so paid by the defendant to the plaintiff was a fair and reasonable amount in full settlement of all alimony claims of the plaintiff, and of all claims for the support and maintenance of the minor child of plaintiff and defendant, and for all claims of property rights by the plaintiff against the defendant, and that the defendant should not be required to pay any further sum to the plaintiff by virtue of any of the facts alleged in plaintiff's petition." (R. 83)

On appeal to the Supreme Court of Oklahoma the judg-

ment of the trial court was affirmed except with respect to attorney's fees and costs, and the case was remanded to the trial court for a hearing "for that purpose only."

The following language of the Supreme Court strikes down the alleged contract:

"* * * it appears that the theory upon which recovery of permanent alimony was denied was that the defendant had adequately discharged his duty to pay alimony by the payments voluntarily made pursuant to the agreement or arrangement, existing between the parties subsequent to their separation" (p. 518 of 99 P. (2d)), and "we are not justified in concluding that the trial court abused its judicial discretion in determining that said amount satisfied defendant's legal obligation to his former wife and their daughter who has now attained her majority." (p. 519)

The "agreement or arrangement existing between the parties," referred to in the State Supreme Court opinion, is the alleged contract upon which respondent now seeks to recover, and since the state court has determined that petitioner "by the payments voluntarily made pursuant to the agreement or arrangement" has fully discharged his duty to pay alimony, it follows that the alleged contract can not be made the basis of recovery in this action.

Since the complete primary obligation to support was discharged, as the court says it was, the contract is extinguished because it fixed the extent of that same primary obligation to support.

The state court judgment is tantamount to a disapproval of the alleged contract as entitling respondent to any additional alimony.

We think the Circuit Court of Appeals erroneously held

that the state court did not purport to disapprove or supersede the alleged contract.

The Supreme Court found that respondent had received everything to which she was entitled and it follows that if by virtue of the contract she received any more she would receive something to which she was not entitled, and no intention can be imputed to the Supreme Court to leave the way open for her to receive anything to which she is not entitled.

A similar situation was before the Supreme Court in *Dresser v. Dresser*, 164 Okl. 94, 22 P. (2d) 1012. In that case the parties had entered into an alimony contract whereby defendant agreed to pay plaintiff \$1,000.00 per month, which was embodied in a subsequent divorce decree. The decree was void as to alimony because not rendered for a definite sum. (*Dutton v. Dutton*, 97 Okl. 234, 223 Pac. 149; *Boulanger v. Boulanger*, 127 Okl. 103, 260 Pac. 49.) Plaintiff sued primarily for such alimony as would be equitable or in the alternative for equitable damages on the contract. The Supreme Court having found that she was not entitled to recover, said:

“Her contract was subject to an adjudication of the court upholding it or setting it aside, and since we have concluded that she was entitled to recover nothing, the agreement was manifestly unfair.”

POINT THREE.

The Circuit Court of Appeals was bound by controlling decisions of the Supreme Court of Oklahoma under which the contract sued on was extinguished by the state court judgment in *Miller v. Miller*.

In Oklahoma, a contract for alimony or separate maintenance, even if valid, creates no new duty, it merely pur-

ports to fix, by agreement of the parties instead of by court decree, the extent of the undischarged obligation resulting from the husband's alleged violation of his marital duty to support and maintain his wife or former wife. Some court had jurisdiction to determine the measure and extent of petitioner's obligation to pay alimony. It was not the divorce court in New Jersey because petitioner had been constructively served. It was the Oklahoma court in *Miller v. Miller* (*Spradling v. Spradling*, 74 Okl. 276, 181 Pac. 148; *West v. West*, 114 Okl. 279, 246 Pac. 599). Respondent sued in that court for the determination of her alimony rights. She pleaded the alleged alimony contract, asked its approval, and for alimony in accordance therewith and for additional alimony. She had but one remedy—a suit for alimony—whether measured by proof of petitioner's primary obligation or by the separate maintenance agreement. Both were considered by the court, which found and determined that petitioner's obligation to pay alimony had been fully discharged. We contend that respondent's claim for alimony was thereby wiped out, which resulted in extinguishing the contract. The Circuit Court of Appeals holds, however, that the contract was not extinguished and survived the state court judgment because "the remedy afforded for alimony, incidental to divorce, and a remedy upon a separate maintenance agreement, independent of the divorce and alimony proceedings, are not inconsistent but concurrent remedies, and a defaulting party may be bound by both the decree for alimony and the agreement." (R. 100) Cited in support of this holding are four California cases, one New York case, and one Federal case that originated in Oregon. No Oklahoma cases are cited and the holding of the court is contrary to *Finley v. Finley*, 174 Okl. 457, 50 P. (2d) 643; *McRoberts v. McRoberts*, 177 Okl. 156, 57 P.

(2d) 1175, controlling decisions of the highest court in Oklahoma.

Finley v. Finley was a suit on a separate maintenance agreement which had been incorporated in a divorce decree which was void as to alimony because it did not limit the amount of alimony payments in time or total. The alimony agreement was not entered into with the expectation that it would be submitted to a court "so long as both parties live up to the provisions of these articles of agreement," but that either party was at liberty to bring suit for divorce. Notwithstanding this provision of the contract, plaintiff four days after execution of the contract sued her husband for divorce and in her petition set forth the foregoing contract and prayed for alimony in the amount provided therein. The action was not contested and the provisions of the agreement were incorporated in the divorce decree. In holding that the divorce court is not bound by an alimony agreement and that a decree fixing alimony extinguishes a pre-existing alimony contract, the court said:

"Suppose the court not feeling bound by the contract had awarded the plaintiff in the divorce action only \$30 per month instead of the \$60 which was awarded. Could the wife receive and accept the \$30 per month, under said divorce decree, and then maintain an action on the contract for \$60 per month? It is obvious that she could not, for in such a case it is apparent that the contract would be extinguished by the decree."

This is directly contrary to the opinion of the Circuit Court of Appeals in the case at bar that "a defaulting party may be bound by both the decree for alimony and the agreement." (R. 100)

Could the court have any more plainly said that the

contract is gone when the issue of alimony is tendered and determined?

McRoberts v. McRoberts was a suit upon a contract which had been entered into in contemplation of divorce and which attempted to fix the property rights of the parties. The divorce had been granted in Georgia and the property rights determined in accordance with the contract. In holding that the only effect of the contract was to assist the court in determining alimony the court said:

“ * * * The rule of law is universal that such a contract is not binding on the divorce court, and that *the court may ignore it*, if it does not conform to the equities in this case. * * * ” (p. 1177) (Italics ours.)

and held that the contract was extinguished by the alimony decree, saying:

“ * * * let us assume that the court granted the divorce, but not feeling bound by the contract, awarded \$75 monthly, or \$300 monthly: it is obvious that the plaintiff could not then later sue on the contract for the difference between the \$75 awarded and the \$150 contemplated in the contract, nor could the defendant insist upon paying only \$150 a month, if the award had been \$300, on the contention that he had contracted to pay only \$150, and therefore was not bound by the decree. It is thus apparent that if the effect of the contract is enlarged to any greater field than that of assistance and aid to the court in the determination of the immediate controversy, we are at once confronted with an entangling maze of legal contradictions and incongruities.

“The next question, then, is: When does such a contract become extinguished? The logical answer seems to be that it becomes extinguished when, as in the case of other contracts, it has served its purpose. We have already defined its purpose. Our view of the

matter is that when the property relationship and duties of the parties were considered by the divorce court, including not only their own ideas thereof as expressed in the contract, but also all surrounding circumstances, and on those facts the decree was formed and entered, the contract, if it may be called such, had served its purpose and thereby became extinguished."

The Circuit Court of Appeals attempts to distinguish *Finley v. Finley* and *McRoberts v. McRoberts* upon the ground that the contracts involved in these cases were extinguished because they had served their manifest purposes by having been submitted to the divorce courts and incorporated in the divorce decree, whereas the parties did not intend the contract in the case at bar to be " * * * submitted and approved by the divorce court and as approved, incorporated in and superseded by the divorce decree. * * *" Said the Circuit Court of Appeals:

"What was the purpose of the appellant when she submitted the alleged agreement to the alimony court in Oklahoma? She sought to have the same approved, and as approved superseded by the equitable judgment of the court. But the Oklahoma court, treating the action as one for alimony, merely considered the amount of money which the appellee had paid to the appellant, and based upon that proof, the court adjudged that appellant had been paid all to which she was equitably entitled under the applicable laws of Oklahoma. Its judgment did not purport to approve, disapprove, modify, annul, or supersede the alleged contract. On the other hand, it expressly refused to adjudicate the contractual rights of the parties under the alleged agreement, and by fair implication, we think, left the appellant to her remedy on the contract. *Miller v. Miller*, *supra*, p. 520. See also *Murphy v. McElroy*, *supra*; *Seyler v. Seyler*, *supra*; *Elliot v. Dunham*, *supra*; *Corbin v. Mathews*, *supra*."

It is not a question of what was the purpose of the respondent in submitting the contract to the Oklahoma court, but what was the *effect* under controlling Oklahoma decisions of submitting such contract to the court. *Finley v. Finley*, 174 Okl. 457, 50 P. (2d) 643, 646, answers that question:

“When the wife submitted the contract to the court in the divorce case, she chose her forum for the enforcement thereof, even though it was not a contract in contemplation of divorce. * * * ”

If the submission of the contract to the Oklahoma Court had the same effect as in *Finley v. Finley*, where the contract was not entered into in contemplation of being submitted to the divorce court; or in *McRoberts v. McRoberts*, where the contract was held to have been a mere guide in determining alimony, then the contract has been extinguished. It was not material that the Oklahoma court was not the divorce court. It was the alimony court and as was said in *Spradling v. Spradling*, *supra*:

“ * * * ‘We see no difference between this and any other divorce suit, so far as the question of alimony is concerned. * * * ’ ”

Seyler v. Seyler, 190 Okl. 250, 122 P. (2d) 804, approves the doctrine of *Finley v. Finley* and *McRoberts v. McRoberts*. That was an action at law on a separate maintenance contract after a divorce decree silent as to alimony. The court said:

“ * * * defendant cites many cases which hold that such agreements are not binding upon a court in a divorce action. But nearly all the cases cited are where the agreement was presented to the court in the divorce proceeding. The general rule seems to be that where

this is done the court in passing upon the question of alimony may approve and adopt the agreement, reject it entirely, or modify it as the facts and circumstances may warrant.

“The question is whether the agreement was extinguished by the decree of divorce. *McRoberts v. McRoberts*, * * * answers that question. * * *, ‘When the property relationship and duties of the parties were considered by the divorce court, including not only their own ideas thereof as expressed in the contract, but also all surrounding circumstances, and on those facts the decree was formed and entered, the contract, if it may be called such, had served its purpose and thereby became extinguished.’

“In this case the agreement was never presented to or considered by the court. It could not have been extinguished under the rule above stated. *There was no issue of alimony, division of property or property settlement presented in the pleadings or settled by the court.*” (Italics ours.)

POINT FOUR.

Under controlling decisions of the Supreme Court of Oklahoma the present action is estopped or barred by the state court judgment in *Miller v. Miller*.

In support of this proposition we rely upon the well settled rule in Oklahoma that:

“Where a right, question or fact is distinctly put in issue and directly determined by a court of competent jurisdiction in a former suit between the same parties or their privies, the former adjudication of that fact, right or question is binding on the parties and their privies in a subsequent suit, irrespective of whether or not the causes of action are the same.”

—*Cressler v. Brown*, 79 Okl. 170, 192 Pac. 417;

Woodworth v. Town of Hennessey, 32 Okl. 267, 122 Pac. 224;

Johnson v. Gillett, 66 Okl. 308, 168 Pac. 1031;

and such judgment is *res adjudicata*,

“not only as to all matters actually litigated and determined in the former action but as to all matters germane to issues which could or might have been litigated or determined therein.”

—*Baker v. Leavitt*, 54 Okl. 70, 73, 153 Pac. 1099, 1100;

City of El Reno, et al., v. Cleveland-Trinidad Paving Co., 25 Okl. 648, 107 Pac. 163;

Woodworth v. Town of Hennessey, 32 Okl. 267, 122 Pac. 224;

Markham v. Dugger, 34 Okl. 492, 126 Pac. 190;

Gosnell v. Prince, 36 Okl. 445, 129 Pac. 27;

Pioneer Tel. & Tel. Co. v. State, 40 Okl. 417, 138 Pac. 1033;

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Alfrey v. Colbert, et al., 44 Okl. 246, 144 Pac. 179;

Bowen v. Carter, et al., 42 Okl. 565, 144 Pac. 170;

Prince v. Gosnell, 47 Okl. 570, 149 Pac. 1162;

Earl v. Earl, et al., 48 Okl. 442, 149 Pac. 1179;

Corrugated Culvert Co. v. Simpson Township, 51 Okl. 178, 151 Pac. 854;

Parks v. Haynes, 52 Okl. 63, 152 Pac. 400.

And to the same effect see:

Factor Oil Co. v Brydia, 184 Okl. 113, 85 P. (2d) 311;

Hine v. Board of County Commissioners, 188 Okl. 260, 108 P. (2d) 112;

Uphoff v. Meier, 184 Okl. 378, 87 P. (2d) 960;

Cunningham v. Oklahoma City, et al., 188 Okl. 466, 110 P. (2d) 1102.

In the state suit respondent pursued a remedy she had a right to invoke. The alleged alimony contract sued on in the instant action represents the same claim that was adjudged against respondent in the state court after a trial upon the merits.

Even if respondent had in no wise relied upon the alleged alimony contract (which she did) she is nevertheless barred under the foregoing controlling Oklahoma authorities from bringing the instant action.

POINT FIVE.

No Oklahoma Supreme Court decisions cited in the opinion of the Circuit Court of Appeals supports its decision, but so far as pertinent support our contentions.

The Oklahoma cases hereinbefore cited sustain our position and do not sustain the opinion of the Circuit Court of Appeals. We will now refer to all the remaining Oklahoma cases cited by that court.

The Circuit Court of Appeals holds "that a separation agreement, otherwise valid and enforceable, is not extinguished but survives a subsequent divorce and alimony decree."

The court's statement is correct as to a divorce decree which is silent as to alimony, but the court went too far when it held that a separation agreement survived an alimony decree. Such contract never survives an alimony decree and only where the divorce decree is silent as to alimony and the issue of alimony was not tendered and determined does such a separation agreement, if valid, survive.

Cited in support of the above holding of the Circuit Court of Appeals are the following Oklahoma cases:

King v. King, 138 Okl. 40, 280 Pac. 271;

Murphy v. McElroy, 185 Okl. 388, 92 P. (2d) 369;
Seyler v. Seyler, 190 Okl. 250, 122 P. (2d) 804;
Elliott v. Dunham, 130 P. (2d) 534;
Stark v. Stark, 185 Okl. 348, 91 P. (2d) 1064.

King v. King, *supra*, the issue of alimony had never been determined.

Murphy v. McElroy, *supra*, “* * * the divorce decree made no reference to property settlement or alimony * * *.”

Seyler v. Seyler, *supra*:

“* * * There was no issue of alimony, division of property or property settlement presented in the pleading or settled by the court.”

Elliott v. Dunham, *et al.*, *Dunham v. Same* (two cases), *Elliott v. Pugh*, *et al.*, (two cases) (Okla., not yet officially reported), 130 P. (2d) 534, the contract between husband and wife and third parties covered alimony and other matters. There were four cases and the appeals of the four cases were consolidated. The alimony part of the contract was not involved on appeal.

Stark v. Stark, *supra*, was an action upon a separate maintenance agreement. The parties were separated but not divorced and the issue of alimony had never been tendered and determined by any court.

Another Oklahoma case cited by the Circuit Court of Appeals is *Wheeler v. Wheeler*, 167 Okl. 598, 32 P. (2d) 305. This case does not sustain the opinion of the Circuit Court of Appeals. It lays down the following rule which the trial court must follow when a property settlement or maintenance and alimony contract is brought before a divorce or alimony court:

“* * * The court in the exercise of its chancery pow-

ers and the mandatory statutory duty, must look beyond the terms of the agreement to ascertain all the facts and circumstances surrounding its execution and consider the relationship of the parties at the time of the trial, their ages, needs, health, financial conditions, opportunities to provide for themselves, * * *."

Conclusion.

The decision of the Circuit Court of Appeals sustains the instant action, which under controlling decisions of the Supreme Court of Oklahoma is barred by the former judgment of the state court in a previous suit and it could not have been maintained in any state court in Oklahoma. This decision conflicts with the doctrine and policy of the *Erie R.* case and subsequent decisions following it, and should, therefore, be reversed and the judgment of the trial court affirmed.

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No. 147

In the Supreme Court of the United States

October Term, 1942.

HERBERT FREDERIC MILLER, *Petitioner,*

vs.

ELSIE A. MILLER, *Respondent.*

Response to Petition for Writ of Certiorari.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1942.

No. 147

HERBERT FREDERIC MILLER, *Petitioner,*

vs.

ELSIE A. MILLER, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF *CERTIORARI*.

Preliminary.

By way of discussion preliminary to the argument in answer to the points submitted by petitioner, we observe that although petitioner proceeds upon the theory that the court below overlooked the doctrine and policy in *Erie R. Co. v. Tompkins*, 304 U. S. 64, and subsequent cases in accord therewith, and that the court below decided the case in conflict with controlling decisions of the highest court of Oklahoma, petitioner has failed to call attention to any Oklahoma case presenting issues the same or similar to those involved in this case in which the holding is at variance with the holding rendered in this case. As more fully appears hereafter, petitioner has cited cases in support of his position in which it appears that one or more of the following elements was present: (1) Alimony relief had actually been granted in a previous proceeding. (2) The alimony agreement had been explicitly held by the trial court to be "unfair." (3) That the alimony agreement appeared from a

construction thereof to have been *intended* by the parties to be superseded or extinguished by the divorce decree.

In the instant case, none of the foregoing elements are present. Alimony relief involving the contract herein had never been granted in a previous proceeding. The contract involved herein was not adjudicated to be unfair by the state trial court. Also as was held by the Circuit Court of Appeals the contract herein appears upon a construction and intepretation giving full effect and purpose to the intention of the parties to have been intended to be unimpaired by the decree entered in either the divorce or alimony proceeding. Petitioner, therefore, has failed to present to this court any Oklahoma decision which would be *controlling in this case* and which is in conflict with the opinion of the Circuit Court of Appeals. The precise questions discussed in the cases cited by petitioner not being the same or analogous to those involved in this case, the federal courts are, of course, not required under the rule announced in *Erie R. Co. v. Tompkins* to apply such cases to a different state of facts. (See *Powell v. Maryland Trust Company*, 125 F. (2d) 260, *certiorari* denied 316 U. S. 671, petition for rehearing denied 316 U. S. 711.)

As a matter of fact, respondent states that the controlling Oklahoma decisions in this case which are hereinafter cited and discussed by respondent are fully and completely in accord with the opinion rendered by the Circuit Court of Appeals.

Furthermore, the decision of the lower court involves primarily a factual determination and this court does not grant *certiorari* to review questions or conclusions of fact.

We will take up the five points argued in petitioner's brief in their numerical order.

Petitioner's Point One.

Petitioner states:

“This cause is governed by controlling decisions of the Supreme Court of Oklahoma.”

We take no issue with this statement as a proposition of law. In our opinion, however, it is questionable whether this rule is applicable in this case and in any event we believe that the controlling Oklahoma decisions support the opinion of the Circuit Court of Appeals.

Petitioner's Point Two.

Petitioner states:

“By reason of the decision in *Miller v. Miller*, the instant action cannot be maintained.”

The judge in the state trial court tried the case as an action to recover *alimony* rather than an action to recover on *contract*. The question as to whether the petitioner has discharged his *contractual* obligations was never adjudicated in the state court. On appeal to the Supreme Court of the State of Oklahoma (*Miller v. Miller*, 99 P. (2d) 515) the Supreme Court explicitly refused to treat the action as one *ex contractu* stating as follows, in the opinion:

“This case is thus definitely identified as an action for alimony as distinguished from an action *ex contractu*.”

The Supreme Court then proceeded to affirm the holding of the trial court in so far as petitioner's statutory obligation to pay alimony was concerned. The state trial court and the state Supreme Court at no time proposed to pass upon the legal effect and purpose of the contract but on the contrary carefully refrained from passing on said ques-

tion. Therefore, the denial of alimony in the action treated as a strictly alimony action cannot be said to be tantamount to a disapproval of the contract.

The case of *Dresser v. Dresser*, 164 Okl. 34, 22 P. (2d) 1012, cited by petitioner is not in point because the court's denial of alimony in that case was based upon the specific reason that "the agreement was manifestly unfair." The court further stated in that case "while the parties may contract with regard to alimony, unless the agreement is fair to both parties, it will not be permitted to stand." Petitioner cannot point to a single word in the Oklahoma record of this case holding the contract here involved to be "unfair." The Oklahoma courts never disapproved the instant contract (as was done in the *Dresser* case) thus affording both parties the fair and equal opportunity to adjudicate the questions in an action *ex contractu* before a proper forum.

Furthermore, the *Dresser* case was decided several years prior to the cases of *Stark v. Stark* and *Murphy v. McElroy*, hereafter cited, which cases for the first time in Oklahoma courts definitely settled the right to maintain an action *ex contractu* on alimony contracts, such as is involved here.

Petitioner's Point Three.

Petitioner states:

"The Circuit Court of Appeals was bound by controlling decisions of the Supreme Court of Oklahoma under which the contract sued on was extinguished by the state court judgment in *Miller v. Miller*."

The controlling decisions of the Supreme Court of Oklahoma support the opinion of the Circuit Court of Appeals. Upon reading the appellate court's opinion, it is apparent

that the Circuit Court based its decision upon the controlling Oklahoma cases. The two cases cited by petitioner under this point (*Finley v. Finley*, 174 Okl. 457, 50 P. (2d) 643, and *McRoberts v. McRoberts*, 177 Okl. 156, 57 P. (2d) 1175) are not in point because in both cases alimony relief had been granted by the original trial court and the contracts therein were *intended* to be merged in the decree. If the trial court had granted the respondent in this case an award of alimony and thereafter she had attempted to recover against the petitioner in an action on the contract, the foregoing cases might be in point; but such is not the fact in this case.

Petitioner's argument that the mere refusal of the trial court to award respondent alimony without disapproving the contract resulted in the extinguishment of the contract between petitioner and respondent is not supported by the citation of any authorities from Oklahoma or elsewhere.

In the case of *Murphy v. McElroy*, 185 Okl. 288, 92 P. (2d) 369, it appears that while the divorce action was pending in the trial court, the parties entered into a settlement contract providing for the payment of certain installments by the husband to the wife. The divorce decree was entered in favor of the wife and no reference was made therein to the settlement or the payment of alimony. The husband defaulted after having made payments over a period of ten years. The Supreme Court of Oklahoma in that case which was instituted to recover under the contract, as is true here, stated with respect to whether or not the contract was extinguished by the divorce decree as follows:

"As we have already observed, the contract was not merged into a decree or extinguished by it but it stands as a valid and binding contract between the parties."

Likewise the Oklahoma Supreme Court in the case of *Elliott v. Dunham*, 130 P. (2d) 534, in considering the effect of a contract such as we have in this case said:

“Such agreements may be in the nature of stipulations entered into for the purpose of dispensing with proof, which are extinguished when the decree of divorce is rendered (*McRoberts v. McRoberts*, 177 Okl. 156, 57 P. (2d) 1175), or they may be of such nature that, where not incorporated in or superseded by the decree of divorce, their continued existence and binding effect is unimpaired thereby. (*King v. King*, 138 Okl. 40, 280 P. 271; *Murphy v. McElroy*, 185 Okl. 388, 92 P. (2d) 369; *Lazar v. Superior Court*, 16 Colo. (2d) 618, 107 P. (2d) 249; *Doig v. Palmer*, 97 Utah 150, 91 P. (2d) 442; 19 C. J. 250; 27 C. J. S. 1159; *Separation Agreements*, Lindey, p. 389.)

“The contract involved in the instant cases is clearly of the latter type. It contains no provision for its adoption by the trial court, or incorporation in the decree of divorce.”

The sole question for determination in the *Elliott* case was whether or not the settlement contract which was made between the husband and wife prior to the divorce decree was superseded or extinguished by the decree of divorce.

The question as to whether or not the contract in this case was or was not extinguished by the judgment rendered in the state court is essentially one involving the interpretation of the contract. As stated in *Elliott v. Dunham, supra*, “such agreements may be in the nature of stipulations entered into for the purpose of dispensing with proof which are extinguished when the decree of divorce is rendered * * * or they may be of such a nature that, where not incorporated in or superseded by the decree of divorce, their continued existence and binding effect is unimpaired thereby.”

The Circuit Court of Appeals with the complete record before it, reached the conclusion that the contract in this case was not impaired or superseded by the judgment in the state court for the reason that the manifest purpose of the contract disclosed that the parties *intended* that the contract was not to be so impaired or superseded. In this respect, the Circuit Court of Appeals stated:

“What then was the manifest purpose of the alleged contract? Did the parties intend that it should be submitted and approved by the divorce court, and as approved incorporated in and superseded by the divorce decree—obviously not.”

The construction of the contract in this connection was essentially a *factual* matter, involving the process of attempting to arrive at the *intention* of the parties. The rule announced in *Erie R. Co. v. Tompkins*, *supra*, does not require this court to inquire into the *factual* conclusions of the lower court but only to determine whether the *law* of the state has been applied to the factual considerations, so reached. This court will not review a question of fact on petition for *certiorari*. (*United States v. Johnson*, 268 U. S. 220, 69 L. ed. 923.)

The Circuit Court of Appeals in this case did apply the applicable law of the State of Oklahoma to the factual situation involved. This is evident from a reading of the opinion which cites and discusses controlling Oklahoma decisions in support of the opinion rendered. The opinion, therefore, is in complete accord with the controlling Oklahoma decisions as is required by the rule in *Erie R. Co. v. Tompkins*. As a matter of fact, upon reaching its conclusion as to the intention of the parties with respect to the effect and purpose of the contract, had the Circuit Court of Appeals reached any other conclusion, such adverse con-

clusion would have been in disregard of the Oklahoma controlling decisions and, therefore, would truly have been violative of the rule in *Erie R. Co. v. Tompkins*.

Petitioner's Point Four.

Petitioner states:

“Under controlling decisions of the Supreme Court of Oklahoma the present action is estopped or barred by the state court judgment in *Miller v. Miller*.”

In discussing this point, a brief history of this case may be in order.

When the action was originally instituted in the state court, the right of plaintiff to recover *ex contractu* was not clear, the decisions in *Murphy v. McElroy, supra*, and *Stark v. Stark*, 185 Okl. 348, 91 P. (2d) 1064, not having at that time been handed down. As hereinbefore pointed out, the trial judge of the state court treated the case as an action for alimony. After the trial of the case and on June 27, 1938, and July 11, 1939, respectively, the decisions in the *Stark* case and *Murphy* case were handed down, definitely holding that an action *ex contractu* can be maintained on such contracts as are involved in this case. It was therefore too late to present this theory in the trial court but as the Oklahoma Supreme Court stated in its opinion, the respondent did in her briefs “in effect invoke as applicable the doctrine of *Murphy v. McElroy*.” To this the petitioner objected in the Supreme Court on the ground that “plaintiff is attempting to change the theory of this lawsuit on appeal” as a result of which the state Supreme Court stated with respect to this particular matter that, “in so far as the theory presented by the plaintiff as outlined above (meaning the right to recover *ex contractu*) constitutes a departure from

the theory presented by her in the trial court, it will not be considered herein.”

As a result of the foregoing, the utmost that can be said is that the respondent failed in the original action for alimony for the reason that her proper remedy, an action *ex contractu*, was misconceived and she was compelled to pursue a mistaken remedy in an action for alimony. The Oklahoma Supreme Court has held in a number of decisions that the pursuance of a misconceived or fatuous remedy does not preclude a party from pursuing a remedy that actually exists and the doctrine of *res adjudicata* or election is not applicable in such cases to divest such person of a right actually vested in him by law or contract.

—*Bruner v. Bearden*, 80 Okl. 154, 195 Pac. 117;

Town of Cross v. DeRoberts, 51 Okl. 765, 155 Pac. 496;

Tulsa Rig Reel & Mfg. Co. v. Arnold, 94 Okl. 120, 221 Pac. 19;

Ahrens v. Commercial National Bank, 100 Okl. 250, 229 Pac. 237.

In *McIntosh, Administrator, v. Lynch, et al.*, 78 Okl. 85, 188 Pac. 1079, it was held as follows:

“The fatuous choice of a fancied remedy that never existed and the futile pursuit of it until the court adjudges that it never had existence, is no defense to an action to enforce a natural remedy inconsistent with that first invoked.”

To the same effect are:

Crane v. Owens, 180 Okl. 452, 69 P. (2d) 654;

Howard v. Brown, 172 Okl. 308, 44 P. (2d) 549;

Electrical Research Products v. Hanotis Bros., 170 Okl. 144, 39 P. (2d) 36;

Tulsa Rig Reel & Mfg. Co. v. Arnold, *supra*.

The above cases together with numerous others were considered by the Circuit Court of Appeals in the briefs presented to it. In as much as this case presents a typical situation where the respondent pursued a mistaken remedy in the state court, the above Oklahoma cases are controlling in permitting her to prosecute the real remedy available to her under the contract. Had this right been denied her, she would not only have been deprived of any sort of relief but she would have been deprived of an opportunity to obtain a full and complete adjudication of her rights under the contract, merely because her original action had been unfortunately misconceived; and because at the instance and objection of petitioner the Supreme Court of Oklahoma refused to pass upon the validity and enforceability of the contract. To have deprived her of such right would have been contrary to the above controlling Oklahoma decisions applicable in such cases.

Petitioner's Point Five.

Petitioner states:

“No Oklahoma Supreme Court decisions cited in the opinion of the Circuit Court of Appeals supports its decision, but so far as pertinent support our contentions.”

We see no reason to discuss this point as it is merely the negative statement of what has been stated affirmatively under Points Three and Four under each of which points we have cited controlling Oklahoma decisions supporting the opinion of the Circuit Court of Appeals.

Conclusion.

We, therefore, respectfully submit that the opinion of the Circuit Court of Appeals is based primarily upon a factual determination and is not in conflict with any controlling Oklahoma decisions but is in accordance therewith, and therefore, the petition for the writ of *certiorari* should be denied.

Respectfully submitted,

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